

AMENDED IN SENATE AUGUST 21, 2013

AMENDED IN SENATE JULY 9, 2013

AMENDED IN SENATE JUNE 10, 2013

AMENDED IN ASSEMBLY MAY 23, 2013

AMENDED IN ASSEMBLY MAY 6, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 729

Introduced by Assembly Member Roger Hernández

February 21, 2013

An act to amend Sections 912 and 917 of, and to add Article 9.5 (commencing with Section 1048) to Chapter 4 of Division 8 of, the Evidence Code, relating to evidentiary privileges.

LEGISLATIVE COUNSEL’S DIGEST

AB 729, as amended, Roger Hernández. Evidentiary privileges: union agent-represented worker privilege.

Existing law governs the admissibility of evidence in court proceedings and generally provides a privilege as to communications made in the course of certain relations, including the attorney-client, physician-patient, and psychotherapist-patient relationship, as specified. Under existing law, the right of any person to claim those evidentiary privileges is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to a disclosure made by anyone.

This bill would provide that a union agent, as defined, and a represented employee or represented former employee have a privilege to refuse to disclose any confidential communication between the employee or former employee and the union agent while the union agent was acting in his or her representative capacity, except as specified. The bill would provide that a represented employee or represented former employee also has a privilege to prevent another person from disclosing a privileged communication, except as specified. The bill would further provide that this privilege may be waived in accordance with existing law and does not apply in criminal proceedings.

This bill would incorporate additional changes to Section 912 of the Evidence Code made by this bill and AB 267, to take effect if both bills are chaptered and this bill is chaptered last.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 912 of the Evidence Code is amended to
2 read:
3 912. (a) Except as otherwise provided in this section, the right
4 of any person to claim a privilege provided by Section 954
5 (lawyer-client privilege), 980 (privilege for confidential marital
6 communications), 994 (physician-patient privilege), 1014
7 (psychotherapist-patient privilege), 1033 (privilege of penitent),
8 1034 (privilege of clergyperson), 1035.8 (sexual assault
9 counselor-victim privilege), 1037.5 (domestic violence
10 counselor-victim privilege), or 1048 (union agent-represented
11 worker privilege) is waived with respect to a communication
12 protected by the privilege if any holder of the privilege, without
13 coercion, has disclosed a significant part of the communication or
14 has consented to disclosure made by anyone. Consent to disclosure
15 is manifested by any statement or other conduct of the holder of
16 the privilege indicating consent to the disclosure, including failure
17 to claim the privilege in any proceeding in which the holder has
18 the legal standing and opportunity to claim the privilege.
19 (b) Where two or more persons are joint holders of a privilege
20 provided by Section 954 (lawyer-client privilege), 994
21 (physician-patient privilege), 1014 (psychotherapist-patient
22 privilege), 1035.8 (sexual assault counselor-victim privilege),

1 1037.5 (domestic violence counselor-victim privilege), or 1048
2 (union agent-represented worker privilege) a waiver of the right
3 of a particular joint holder of the privilege to claim the privilege
4 does not affect the right of another joint holder to claim the
5 privilege. In the case of the privilege provided by Section 980
6 (privilege for confidential marital communications), a waiver of
7 the right of one spouse to claim the privilege does not affect the
8 right of the other spouse to claim the privilege.

9 (c) A disclosure that is itself privileged is not a waiver of any
10 privilege.

11 (d) A disclosure in confidence of a communication that is
12 protected by a privilege provided by Section 954 (lawyer-client
13 privilege), 994 (physician-patient privilege), 1014
14 (psychotherapist-patient privilege), 1035.8 (sexual assault
15 counselor-victim privilege), 1037.5 (domestic violence
16 counselor-victim privilege), or 1048 (union agent-represented
17 worker privilege), when disclosure is reasonably necessary for the
18 accomplishment of the purpose for which the lawyer, physician,
19 psychotherapist, sexual assault counselor, domestic violence
20 counselor, or union agent was consulted, is not a waiver of the
21 privilege.

22 SEC. 1.5. Section 912 of the Evidence Code is amended to
23 read:

24 912. (a) Except as otherwise provided in this section, the right
25 of any person to claim a privilege provided by Section 954
26 (lawyer-client privilege), 966 (lawyer referral service-client
27 privilege), 980 (privilege for confidential marital communications),
28 994 (physician-patient privilege), 1014 (psychotherapist-patient
29 privilege), 1033 (privilege of penitent), 1034 (privilege of clergy
30 member), 1035.8 (sexual assault counselor-victim privilege),
31 1037.5 (domestic violence counselor-victim privilege), or 1048
32 (union agent-represented worker privilege) is waived with respect
33 to a communication protected by the privilege if any holder of the
34 privilege, without coercion, has disclosed a significant part of the
35 communication or has consented to disclosure made by anyone.
36 Consent to disclosure is manifested by any statement or other
37 conduct of the holder of the privilege indicating consent to the
38 disclosure, including failure to claim the privilege in any
39 proceeding in which the holder has the legal standing and
40 opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 966 (lawyer referral service-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1048 (union agent-represented worker privilege) a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 966 (lawyer referral service-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1048 (union agent-represented worker privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, lawyer referral service, physician, psychotherapist, sexual assault counselor, domestic violence counselor, or union agent was consulted, is not a waiver of the privilege.

SEC. 2. Section 917 of the Evidence Code is amended to read:

917. (a) If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault counselor-victim, domestic violence counselor-victim, or union agent-represented worker relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

(b) A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means or because

1 persons involved in the delivery, facilitation, or storage of
2 electronic communication may have access to the content of the
3 communication.

4 (c) For purposes of this section, “electronic” has the same
5 meaning provided in Section 1633.2 of the Civil Code.

6 SEC. 3. Article 9.5 (commencing with Section 1048) is added
7 to Chapter 4 of Division 8 of the Evidence Code, to read:

8
9 Article 9.5. Union Agent-Represented Worker Privilege

10
11 1048. (a) Except as required by subdivision (b), and subject
12 to Section 912, a union agent and a represented employee or
13 represented former employee have a privilege to refuse to disclose,
14 in any court or to any administrative board or agency, or in any
15 arbitration or other proceeding, any confidential communication
16 between the employee or former employee and the union agent
17 made while the union agent was acting in his or her representative
18 capacity. A represented employee or represented former employee
19 also has a privilege to prevent another from disclosing a
20 confidential communication between the employee and a union
21 agent that is privileged pursuant to this section.

22 (b) A union agent may use or reveal a confidential
23 communication made to the union agent while the union agent was
24 acting in his or her representative capacity in either of the following
25 circumstances:

26 (1) In actions against the union agent in his or her personal or
27 official representative capacity, or against the local union or
28 subordinate body thereof or international union of affiliated or
29 subordinate body thereof or any agent thereof in their personal or
30 official representative capacities.

31 (2) When, after full disclosure has been provided, the written
32 or oral consent of the bargaining unit member has been obtained
33 or, if the bargaining unit member is deceased or has been adjudged
34 incompetent by a court of competent jurisdiction, the written or
35 oral consent of the bargaining unit member’s estate or guardian
36 or conservator.

37 (c) A union agent shall use or reveal a confidential
38 communication made to the union agent while the union agent was
39 acting in his or her representative capacity if required to do so by
40 a court order.

1 1048.1. For purposes of this article, the following terms have
2 the following meanings:

3 (a) “Confidential communication” means information
4 transmitted, by oral or written communication, between a
5 represented employee or represented former employee and a union
6 agent and in confidence by a means which, so far as the employee,
7 former employee, or union agent is aware, discloses the information
8 to no third persons other than those who are present to further the
9 interest of the employee, former employee, or union agent or those
10 to whom disclosure is reasonably necessary for the transmission
11 of the information or the accomplishment of the purpose for which
12 the communication was made, and includes advice given by a
13 ~~union-agency agent~~ *agent* in the course of a representational relationship.

14 (b) “Union agent” means a person employed, elected, or
15 appointed by a labor organization and whose duties include the
16 representation of employees in a bargaining unit in a grievance
17 procedure or in negotiations for a labor agreement and the labor
18 organization. An appointed employee steward is not a union agent
19 except to the extent a represented employee or represented former
20 employee communicates in confidence to the steward regarding a
21 grievance or potential grievance *and the appointed employee*
22 *steward was a steward at the time the communication was made.*

23 1048.2. There is no privilege under this article if the union
24 agent reasonably believes that disclosure of any confidential
25 communication is necessary to prevent a criminal act that the union
26 agent reasonably believes is likely to result in the death of, or
27 substantial bodily harm to, an individual.

28 1048.3. There is no privilege under this article with respect to
29 a confidential communication made to enable or aid a person in
30 committing, or planning to commit, a crime or fraud.

31 1048.4. The privilege established under this article does not
32 apply in criminal proceedings.

33 SEC. 4. Section 1.5 of this bill incorporates amendments to
34 Section 912 of the Evidence Code proposed by both this bill and
35 AB 267. It shall only become operative if (1) both bills are enacted
36 and become effective on or before January 1, 2014, (2) each bill
37 amends Section 912 of the Evidence Code, and (3) this bill is

1 enacted after ~~SB~~ *AB* 267, in which case Section 1 of this bill shall
2 not become operative.

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